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No. 96-860

JAN 30 1997

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JOHN ROE - - - - - - - - - *Petitioner*

versus

KENTUCKY BAR ASSOCIATION - - *Respondent*

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Kentucky

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Respondent, Kentucky Bar Association (the "KBA"), requests that the Court deny the petition for a writ of certiorari (the "Petition") to review the Confidential Order of the Supreme Court of Kentucky entered in this proceeding on August 29, 1996, which Confidential Order imposed a Private Reprimand as discipline on Petitioner John Roe ("Roe") for violation of Kentucky Supreme Court Rule 3.150 ("SCR 3.150") and Kentucky Supreme Court Rule 3.130-3.4(c) ("SCR 3.130-3.4(c)").

KENTUCKY SUPREME COURT RULES INVOLVED

In addition to those Kentucky Supreme Court Rules set forth by Roe, the following provisions of the Kentucky Supreme Court Rules are also involved.

Kentucky Supreme Court Rule 3.160 provides, in relevant part:

(1) Any complaint against an attorney for unprofessional conduct shall be reduced to a sworn written statement and shall be filed with the Director [of the Kentucky Bar Association] who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits.

(2) Notwithstanding the provisions of paragraph (1), when it comes to the attention of the tribunal from any source that an attorney may have engaged in unprofessional conduct, the tribunal may initiate and conduct an investigation, and if it believes from its investigation that there is sufficient evidence to justify its filing a complaint against the attorney it may file such a complaint.

Kentucky Supreme Court Rule 3.170 provides, in relevant part:

Upon the expiration of fifteen days, or receipt of response, the Director [of the Kentucky Bar Association] shall refer the matter together with such investigative evidence as may have been obtained, to the Tribunal to determine whether the complaint should be dismissed or file a charge.

Kentucky Supreme Court Rule 3.190 provides, in relevant part:

If the Tribunal determines . . . that a charge should be filed, it shall prepare such charge stating the . . . facts alleged to constitute unprofessional conduct.

Kentucky Supreme Court Rule 3.200 provides, in relevant part:

Upon the filing of a charge, the Director shall furnish the respondent with a copy by certified mail and notify him that he must within twenty (20) days after receipt of the notice file his answer. . . .

Kentucky Supreme Court Rule 3.230 provides, in relevant part:

> If the answer raises any issue of fact, the Inquiry Tribunal shall notify the Chairman of the House in order that he may appoint an attorney to represent the Association, and appoint a member of the House to act as Trial Commissioner. . . .

Kentucky Supreme Court Rule 3.280 provides, in relevant part:

> There shall be a charge and answer and, when permitted by the Trial Commissioner, a reply and such amendments to pleadings as may be required to serve the ends of justice.

Kentucky Supreme Court Rule 3.300 provides, in relevant part:

> The respondent against whom a charge has been filed shall have the right to be represented by counsel. If the Tribunal finds the answer to the charge raises issues of fact, the respondent shall be entitled to a hearing before a Trial Commissioner. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Commissioner. . . .

Kentucky Supreme Court Rule 3.330 provides, in relevant part:

> The Trial Commissioner shall determine and regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial Commissioner the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must

be proven by substantial evidence. . . . [T]he Trial Commissioner may direct such oral argument as it deems appropriate and receive briefs from all parties. . . .

Kentucky Supreme Court Rule 3.360 provides, in relevant part:

(1) When a disciplinary proceeding has been finally submitted, the Trial Commissioner shall promptly file with the Board within thirty (30) days after the transcript of evidence is filed by the reporter with the Director, the entire transcript of the proceeding, the transcript of testimony together with such papers as may have been filed, and a written report in the nature of findings of fact relating to guilt or innocence, which shall contain a concise statement of:

(a) the charges made against the defense offered by the respondent;

(b) the proceedings had;

(c) the facts which the Commissioner deems proved by substantial evidence.

* * *

(3) . . . [E]ach party shall file a brief simultaneously with the Director and no reply briefs shall be permitted.

Upon receipt of the transcript and the Trial Commissioner's report, and the expiration of the forty (40) days briefing time, the matter shall be scheduled for consideration by the Board. . . .

Kentucky Supreme Court Rule 3.370 provides, in relevant part:

(3) The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found guilty, the Board shall then decide, by a roll call vote, the disciplinary action. Both the findings and any disciplinary action must be agreed upon by 9 or 3/4 of the members of the Board present

> and voting in the proceedings, whichever is less. . . . The Board, by a vote of a majority of the Board present and voting, may remand the case to the Trial Commissioner for clarification of the Trial Commissioner's report or for an evidentiary hearing on points specified in the order of remand. The Board may order the parties to file additional briefs on specific issues.
>
> • • •
>
> (6) The respondent may file a notice for the Court to review the Board's decision within thirty (30) days after the Board's decision is filed with the Clerk stating reasons for review accompanied by a brief supporting his position on the merits of the case. The Director may file a brief within thirty (30) days thereafter . . . .

COUNTERSTATEMENT OF THE CASE

This case arises from KBA disciplinary proceedings brought against Roe for violation of SCR 3.150[1], a rule promulgated by the Supreme Court of Kentucky which places certain restrictions on the disclosure of information connected with a bar disciplinary case.

Roe violated SCR 3.150 by disclosing another bar disciplinary complaint filed against him on or about August 8,

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[1] This Rule provides, in pertinent part, as follows:

> (1) Subject to the following exceptions, nothing connected with a disciplinary case shall be made public unless so ordered by the Court:
>
> • • •
>
> (c) An attorney against whom any complaint or charge is pending may elect to discuss his case with others to the extent he deems it appropriate consistent with the defense of his case and the practice of his profession.
>
> (d) Upon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact.

1994 (the "Bar Complaint"). The Bar Complaint was filed with the KBA by a participant in bankruptcy proceedings then pending in the United States Bankruptcy Court for the Western District of Kentucky (the "Bankruptcy Case"). Roe represented the debtor-in-possession in the Bankruptcy Case. Roe violated SCR 3.150 by including the Bar Complaint as an exhibit to a document filed in the Bankruptcy Case and served on other counsel therein. Because the document was not filed under seal, the Bar Complaint filed in the Bankruptcy Case became a matter of public record.

Following Roe's public disclosure of the Bar Complaint, the KBA filed a bar disciplinary complaint against Roe (the "KBA Complaint")[2]. The KBA Complaint averred that Roe's actions violated the non-disclosure provisions of SCR 3.150 and that Roe, by committing such violation, further violated SCR 3.130-3.4(c), which provides that no lawyer shall "knowingly or intentionally disobey an obligation under the rules of a tribunal.[3]"

As permitted by SCR 3.160(1), Roe responded to the KBA Complaint, in letter form, through the same counsel now representing him in the Petition. Therein, Roe stated:

> Mr. [Roe's] good faith and reasonableness in attaching the [B]ar [C]omplaint as an Exhibit in Bankruptcy Court proceedings appears even more strongly when it is remembered that many federal and state courts have held overly broad confidentiality require-

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[2] Although the more common occurrence is for complainants unconnected with the KBA to file complaints pursuant to SCR 3.160(1), the KBA Inquiry Tribunal is authorized to issue its own complaints when information of a violation has come to its attention from any source. SCR 3.160(2).

[3] This allegation essentially adds very little to the violation of the disclosure restriction. SCR 3.130-3.4(c) would have been violated in that Petitioner was being disobedient to the "rule" (SCR 3.150) of a "tribunal" (the Kentucky Supreme Court).

> ments in bar codes to violate basic guarantees of free speech. Mr. [Roe's] actions clearly fall within the protected areas of free speech recognized by the courts in these cases.
>
> * * *
>
> Mr. [Roe] does not wish to initiate such an action ("to enjoin the operation of corresponding attorney disciplinary rules because they violate the complainant's First Amendment rights to speak and publish information about the status and outcome of a disciplinary proceeding") but he does believe that his interpretation of SCR 3.150, which permitted him to attach Mr. [Smith's] bar complaint as an exhibit, comes closer to accepted ideas of the scope of free speech.

Roe's Response to Inquiry Tribunal Complaint, pp. 4 and 5. It is thus clear that, in his very first "pleading" in this matter, Roe expressly disclaimed any contention that SCR 3.150 was violative of any provision of the United States Constitution.

The Inquiry Tribunal considered the KBA Complaint and Mr. Roe's Response, then voted to issue a formal charge (the "Charge"). As required by SCR 3.200, Roe answered the Charge, in pleading form, through the same counsel now representing him in the Petition. Roe did not allege *any* violation of *any* right held by him under the United States Constitution. Thus, in his very first formal pleading in this matter, Roe omitted any contention that SCR 3.150 was violative of the United States Constitution. Indeed, he did not even go so far as he had in his Response to the KBA Complaint and suggest that the reading which Roe proposed for SCR 3.150 was "closer to accepted ideas of the scope of free speech." Rather, Roe relied on factual defenses and his interpretation of SCR 3.150. No attempt was made thereafter to amend the Answer, although amendments were permissible under SCR 3.280.

Since Roe's Answer raised factual issues, a Trial Commissioner was appointed pursuant to SCR 3.230. The Trial Commissioner, pursuant to SCR 3.300, conducted an evidentiary hearing at which Roe was afforded the full opportunities for presentation of evidence and argument usually afforded in administrative proceedings. A review of the written transcript reveals that Roe (represented by the same counsel now bringing this Petition) advanced no argument that SCR 3.150 is violative of his First Amendment rights. Rather, Roe asserted factual defenses and his interpretation of SCR 3.150. As directed by the Trial Commissioner, Roe presented proposed Findings of Fact for consideration. Roe's "Proposed Findings of Fact of Trial Commissioner" made no mention of any argument that SCR 3.150 was violative of the First Amendment, nor did it contain any proposed findings as to the purposes behind SCR 3.150. No such findings regarding the purpose could have been possible since there was neither evidence nor argument on that subject. Finally, Roe made no proposal for a finding that his conduct was based upon any position relating to his First Amendment rights.

After the Trial Commissioner made his Report to the KBA Board of Governors (the "Board"), the KBA and Roe filed simultaneous briefs with the Board. Although Roe states (in the Petition) that "Mr. Roe raised the issue of the constitutionality of SCR 3.150 in his Brief of Respondent to Board of Governors" (Petition, p.6), such is untrue. Rather, Roe contended that he acted reasonably and in good faith in filing the Bar Complaint in the Bankruptcy Case, readvancing the same "non-contention" made in his Response to the KBA Complaint:

> Mr. [Roe's] good faith and reasonableness in attaching the Bar Complaint as an Exhibit in Bankruptcy Court proceedings appears even more strongly when it is remembered that many federal and state

> courts have held overly broad confidentiality requirements in bar codes to violate basic guarantees of free speech. Mr. [Roe's] actions clearly fall within the protected areas of free speech recognized by the courts in these cases."

Brief to the Board, page 10.[4] In the proceedings before the Board, Roe thus made it clear he was *not* raising the First Amendment as an independent defense against the disciplinary charges. Indeed, he *again* expressly disavowed any intention to mount a First Amendment challenge to SCR 3.150:

> Mr. [Roe] does not desire to initiate such an action ["to enjoin the operation of corresponding attorney disciplinary rules because they violate the complainant's First Amendment rights to speak and publish information about the status and outcome of a disciplinary proceeding"] but he does believe that his interpretation of SCR 3.150, which permitted him to attach Mr. [Smith's] [B]ar [C]omplaint as an exhibit, comes closer to accepted ideas of the scope of free speech.

Brief to the Board, page 11. Far from "preserving" a constitutional challenge (as asserted in the Petition), Roe was continuing to disclaim any intent to challenge SCR 3.150 as violative of the First Amendment.

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[4] Elsewhere in his Brief Roe similarly argued—not that the proposed discipline would violate his First Amendment rights—but that First Amendment doctrine *supported his interpretation* of Kentucky SCR 3.150:

> When it is considered that the literal terms of the Rule appear to give the accused the right to publish a bar complaint, that confidentiality rules are primarily for the benefit of the accused, and that an overly broad application of Kentucky SCR 3.150 would violate the fundamental guarantee of freedom of speech, Mr. [Roe's] position appears well-founded.

Brief to the Board, Conclusion, page 12.

With the case before it in such a posture, it is hardly surprising that the Findings of Fact, Conclusions of Law and Recommendations of Board (the "Board Recommendations," submitted to the Kentucky Supreme Court) contain no discussion of any argument that SCR 3.150 is violative of the First Amendment rights of Roe. For Roe to assert against this factual record that the Board "implicitly rejected the [constitutionality] argument" (Petition, p.6) is insupportable. There was no explicitly raised constitutional argument for the Board to "reject", no evidentiary record in support of such an argument and thus no ability to recommend at all on that subject.

Roe then challenged, in the Kentucky Supreme Court, the Board's Recommendations. In his brief to the Kentucky Supreme Court, Roe *for the first time* advanced the argument that his First Amendment rights would be violated by enforcement of Kentucky SCR 3.150 *against him*, stating that " . . . enforcement of SCR 3.150 against Mr. [Roe] would violate the First Amendment of the Constitution of the United States." Roe's Brief in Opposition to Recommendations of Board of Governors ("Roe Kentucky Supreme Court Brief"), p. 4. Roe, however, did not argue that SCR 3.150 is unconstitutional on its face, as he now argues in his Petition. Rather, Roe simply argued that it would "be a violation of the First Amendment for the Court to follow the Board of [Governor's] Recommendation and sanction *Mr. [Roe]* for *his* exercise of free speech." (Roe Kentucky Supreme Court Brief, page 11; emphasis added). Roe thus challenged Kentucky SCR 3.150 only as applied to him, and did not advance a facial challenge to the Rule. Furthermore, Roe did not argue or request a ruling from the Court as to whether Kentucky SCR 3.150 violates the First Amendment rights of complainants or witnesses to

bar disciplinary proceedings.[5] In his Brief to the Kentucky Supreme Court, Roe also made no argument to the effect that Kentucky SCR 3.150 is unconstitutionally vague, either on its face or as applied to him.[6] Finally, nowhere in Roe's Supreme Court Brief did he argue that SCR 3.150 offends the First Amendment by "indefinitely" restricting disclosure of information and records relating to bar disciplinary proceedings, an issue he now for the first time seeks to raise. Rather than mounting a challenge to SCR 3.150 of the breadth he advances in the Petition, Roe again asserted his reasonableness and good faith argument, supported by analogy to First Amendment law:

> "Mr. [Roe's] good faith and reasonableness in attaching the Bar Complaint as an Exhibit in Bankruptcy Court proceedings appears even more strongly when it is recognized that many federal and state courts have held that overly broad confidentiality requirements in bar disciplinary rules violate basic guarantees of free speech. Mr. [Roe's] actions clearly fall within the protected areas of free speech recognized by the courts in these cases."

Roe Supreme Court Brief, p. 9. Roe's Supreme Court Brief also failed to explain why the Kentucky Supreme Court should pass on his constitutional claims, despite Roe's prior failure to advance the First Amendment as a defense in the proceedings before the Board or to raise the issue before the Trial Commissioner, when a proper factual record could have been developed.

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[5]As further explained *infra*, Roe now asks this Court to rule on those issues, despite his failure to raise them in the underlying Kentucky disciplinary proceedings against him and despite his obvious lack of standing.

[6]In his Petition, however, Roe for the first time advances a void-for-vagueness argument in challenging Kentucky SCR 3.150 as applied in his case.

In a Confidential Order entered on August 29, 1996, the Supreme Court of Kentucky adopted the Board of Governor's Recommendation to discipline Roe with the entry of a Private Reprimand and an order to pay costs. Not surprisingly, the Confidential Order contains no discussion whatsoever of any argument that Roe's First Amendment rights would be impinged by disciplining Roe for his violation of Kentucky SCR 3.150. Given the lack of a record below in either the evidence or the pleadings, it is understandable that Roe can only say (as he does in the Petition) that the "Kentucky Supreme Court also *implicitly* rejected Mr. Roe's constitutional challenge to the rule." Petition, p. 6.

It is against this totally insufficient record that Roe wishes this Court to judge the constitutionality of SCR 3.150, one of the cornerstone provisions of the disciplinary system for Kentucky lawyers created by the Kentucky Supreme Court. The Kentucky rule of confidentiality has a counterpart, at one level or another[7], in the bar disciplinary systems of virtually every other state and all of those would be implicitly impacted to one degree or another by a decision adverse to validity of SCR 3.150.

SUMMARY OF ARGUMENT

It is well settled that this Court will not review constitutional issues arising from state court proceedings if the petitioner failed to raise those issues below. The Court so limits its interference with state court judgments both to afford state courts the first opportunity to respond to constitutional challenges to their laws and to ensure that im-

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[7]Some states have broad confidentiality limitations similar to Kentucky's. A large number require confidentiality at the initial stages of such proceedings but make them public after there has been a determination of probable cause, the level in Kentucky characterized by Inquiry Tribunal issuance of a Charge.

portant constitutional issues will be addressed only when the case comes to this Court with a properly developed record.

In his Petition, Roe mounts a broad-based, facial challenge to SCR 3.150 although he at no time made such an argument in the Kentucky disciplinary proceedings against him. Roe also seeks a ruling on whether SCR 3.150 violates the First Amendment rights of witnesses and complainants involved in Kentucky disciplinary proceedings. Aside from his lack of standing to obtain a ruling from this Court on those issues, Roe in any event failed to advance that contention in the underlying proceedings and failed to ask the Kentucky Supreme Court for a decision on those issues. Roe also asks this Court to hold that the First Amendment is violated by provisions of SCR 3.150 which purportedly place an "indefinite" restriction on disclosure of bar disciplinary information, despite the fact that he made no effort to obtain a ruling from the Kentucky Supreme Court on that issue. Finally, Roe contends Kentucky SCR 3.150 is unconstitutionally vague. Roe again, however, failed to raise this contention in the proceedings below.

To the extent Roe has preserved *any* issue for this Court's review[8], such review would amount to an unwarranted interference in the underlying state proceedings and with the Kentucky Supreme Court's interpretation and application of its own rule. Roe has failed to identify any compelling basis for granting the Petition. Furthermore, because Roe failed to raise a First Amendment argument

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[8]At the most charitable for Roe, the record below might be construed to contain a challenge that SCR 3.150 was unconstitutional *as applied to Roe*. In fact, the arguments advanced do not even adequately preserve that issue. It is certain that the arguments of vagueness, facial invalidity for overbreadth, and the rights of complainants and witnesses were not preserved.

during the fact-finding stage of the proceedings below, there is an inadequate factual record to facilitate review by this Court.

REASONS FOR DENIAL OF THE WRIT[9]

I. The Petition Ignores The Limited Nature Of This Court's Certiorari Jurisdiction To Review Final State Court Judgments

This Court has jurisdictional authority to grant a writ of certiorari from a final judgment of a state's highest court only in very limited circumstances. The governing statutory grant of jurisdiction provides:

> [f]inal judgments or decrees rendered by the highest court of a state . . . may be reviewed by the Supreme Court by writ of certiorari . . . *where the validity of a statute of any State is* ***drawn in question*** *on the ground of its being repugnant to the Constitution . . ,* or where any title, right, privilege or immunity is ***specially set up or claimed*** *under the Constitution . . .*"

28 U.S.C. §1257(a) (emphasis added). This means that if the issues presented in the petition for a writ of certiorari were not properly raised or were not raised at all in the state court proceedings below, then this Court lacks jurisdiction to grant the petition. Indeed, the Court has "consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Webb* v. *Webb*, 451 U.S. 493, 499 (1981) (quoting *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969)).

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[9]The KBA will limit its brief to the issues relevant to the decision whether to grant a writ of certiorari. Roe focuses on the merits of his claim and avoids the issue of justifying the grant of the writ, most likely because the record here is so inadequate as to defy truthful discussion of reasons to grant the writ. The KBA's failure to address herein the merits of Roe's claim is in compliance with this Court's practices rather than a concession that Roe's arguments on the merits are correct.

Consistent with this limitation, the Supreme Court's Rules expressly provide that "[i]f review of a state-court judgment is sought," then the petition for a writ of certiorari shall contain:

> specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, *when the federal questions sought to be reviewed were raised*; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . *so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.*

United States SCR 14.1(g)(i) (emphasis added). *See also Webb*, 451 U.S. at 495.

In this case, while devoting nearly his entire Petition to the *merits* of the issues Roe seeks to have this Court consider, Roe gives short shrift to the important jurisdictional and prudential considerations underlying 28 U.S.C. §1257(a) and United States SCR 14.1(g)(i) as they apply to this case.[10] Roe's devotion to the merits of his position

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[10]Indeed, the following excerpt from the Petition appears to constitute the *entirety* of Mr. Roe's attempt to comply with United States SCR 14.1(g)(i):

> Mr. Roe raised the issue of the constitutionality of [SCR] 3.150 in his Brief of Respondent to Board of Governors, arguing that "[a] broad reading of Kentucky SCR 3.150 would violate Mr. Roe's right to freedom of speech." Although the Board of Governors did not specifically address this argument, its recommendation that Mr. Roe be privately reprimanded implicitly rejected the argument. Again, Mr. Roe preserved the issue in his Brief of Respondent in Opposition to Recommendation of Board of Governors, arguing as he had before the Board of Governors. In adopting the Board's findings, the Supreme Court of Kentucky also implicitly rejected Mr. Roe's constitutional challenge to the rule.

(Petition at p. 6).

and his aversion to these jurisprudential matters is understandable because the essential questions raised in the Petition were neither adequately presented in the underlying Kentucky disciplinary proceedings nor properly preserved for review in this Court. For this reason, the Petition should be denied.

II. The Petition Raises Issues Not Presented in the Proceedings Below and Misstates The Law of Kentucky Regarding The Right To Disclose Information Relating To Bar Disciplinary Proceedings

The first question Roe asks this Court to consider is whether Kentucky SCR 3.150 "is facially unconstitutional because it is overbroad." (Petition at pp. 12). Thus, Roe asks this Court to strike down SCR 3.150 in its entirety on grounds that it is unconstitutional on its face. Roe, however, at no stage of the proceedings below sought to challenge SCR 3.150 on grounds that it is "is facially unconstitutional because it is overbroad." This issue, therefore, is not preserved for review in this Court.

Similarly, Roe dwells on the argument that SCR 3.150 is overbroad "because the prohibition on disclosure is indefinite." (Petition, p. 18).[11] As an initial matter, Roe's

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[11]Roe makes similar arguments throughout his Petition. (*See* Petition, p. 12: "By restricting all categories of information...for an indefinite duration, the Rule violates the First Amendment rights of all complainants, defendants, and witnesses who participate in bar disciplinary proceedings."; p. 13: "[T]he Rule indefinitely ... restricts participants in a disciplinary proceeding from disclosing information regarding various categories of information involved in those proceedings."; p. 14: "[I]f an individual decides to file a complaint, he is indefinitely barred from discussing the merits of the complaint."; and p. 18: "Just as a potential complainant might be dissuaded from filing a complaint if he believes that the filing may become public, a potential complainant might be dissuaded from filing a complaint if he knows that he will be subject to a permanent bar from speaking out about the subject of the complaint").

draconian depiction of this Rule's operation overlooks the existence of several exceptions to its purportedly "indefinite" prohibition on disclosure of bar disciplinary proceedings, and misstates the law of Kentucky in this regard. Ignored by Roe is the following General Order of the Supreme Court of Kentucky, which with certain exceptions makes public the entire record of a bar disciplinary proceeding after its conclusion:

> Effective July 1, 1981, except for those proceedings in which this Court determines either that a private reprimand or no disciplinary action whatsoever is proper and which therefore must remain confidential, in such other matters considered by this Court under SCR 3.370 and SCR 4.290 which by SCR 3.150 and SCR 4.130 are to be kept confidential until otherwise ordered by this Court, the entire record in the proceeding shall be considered public at such time as this Court's opinion becomes final under CR 76.30.

General Order of the Supreme Court of Kentucky, April 27, 1981.

Even more pertinent to the facts of this case are certain exceptions contained within SCR 3.150 which expressly permit disclosure of bar disciplinary proceedings by the attorney charged with discipline. The first exception provides that "[a]n attorney against whom any complaint or charge is pending may elect to discuss his case with others to the extent he deems it appropriate consistent with the defense of his case and the practice of his profession." SCR 3.150(1)(c). The other exception states that "[u]pon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact." SCR 3.150(1)(d).[12] Thus, Roe misstates the law of Kentucky

[12]Roe could have relied on this exception as a legal basis for disclosure of the Bar Complaint filed by Smith had he simply waited until dismissal of those proceedings to make that disclosure.

when he broadly asserts that SCR 3.150 places an "indefinite" bar on the right of bar disciplinary case participants to disclose information.

More importantly, however, Roe never contended in the proceedings below that any temporal aspect of the Rule or its operation offends First Amendment freedoms. Like the other essential questions Roe asks this Court to review, Roe's argument regarding the Rule's purportedly indefinite bar on disclosure was not raised at any stage of the proceedings below. Hence, the argument is not preserved for this Court's review.

In arguing before this Court that SCR 3.150 is unconstitutional as applied to him, Roe raises a "void for vagueness" claim. (Petition, pp. 20-22). Focusing on the exception which under certain circumstances permits disclosure by the attorney against whom a disciplinary complaint or charge is pending, Roe contends that "[t]he vagueness of the Rule makes discriminatory enforcement a real possibility, in violation of the First Amendment." (Petition, p. 21). Roe concludes that "[b]ecause the Rule...is void for vagueness, the Rule, as applied to Mr. Roe, is unconstitutional." (Petition, pp. 21-22). The problem again, however, is that Roe's void for vagueness claim (like his facial challenge to the Rule), was not presented in the Kentucky proceedings and is not preserved for review by this Court.

Even according to Roe's own account of the proceedings below, the claims he presses now, i.e., his facial challenge, void for vagueness claim, temporal argument, and contentions relating to the rights of witnesses and complainants, were not presented to the Kentucky Supreme Court. Roe essentially admits that the only issue he even arguably attempted to present to the Kentucky Supreme Court is whether a "broad reading" of SCR 3.150—as applied to Roe—"would violate *Mr. Roe's* right to freedom of speech." (Petition, p. 6; emphasis added).

Roe does not identify any place in the record of the proceedings below where he raised either his facial challenge to SCR 3.150 or his void for vagueness claim. He also does not identify any place in the record below where he sought a ruling from the Kentucky Supreme Court on whether SCR 3.150 impinges the First Amendment rights of complainants and witnesses to bar disciplinary proceedings. Finally, at no stage of the underlying Kentucky disciplinary proceedings did Mr. Roe contend, as he claims in the Petition, that SCR 3.150 violates the First Amendment by purportedly placing an "indefinite" restriction on disclosure of bar disciplinary information. On the contrary, Roe *at most* argued that enforcement of SCR 3.150 "against Mr. Roe" would violate the First Amendment, and even then made no claim, as he does in his Petition, that the "Rule, as applied...in Mr. Roe's case, was void for vagueness. . . . " (Petition, p. 20).[13] The essential questions presented in the Petition were not raised in the Kentucky state proceedings. Consequently, this Court should decline review of these questions and deny the Petition.

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[13]In his Brief to the Kentucky Supreme Court, Roe argued:

> [E]nforcement of SCR 3.150 *against Mr. [Roe]* would violate the First Amendment of the Constitution of the United States.

Roe Kentucky Supreme Court Brief at p. 4.

> *Mr. [Roe's] good faith and reasonableness* in attaching the Bar Complaint as an Exhibit in Bankruptcy Court proceedings appears even more strongly when it is recognized that many federal and state courts have held that overly broad confidentiality requirements in bar disciplinary rules violate basic guarantees of free speech. *Mr. [Roe's] actions* clearly fall within the protected areas of free speech. . . .

Roe Kentucky Supreme Court Brief at p. 9.

> When the reasoning of the preceding authorities is applied to the instant case, *it becomes readily apparent that [Roe's]*

(Continued on next page)

Pertinent in this regard is *Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987) ("*Rotary Club*"), a case decided when 28 U.S.C. §1257(2) gave this Court appellate jurisdiction (as opposed to certiorari jurisdiction, as provided by current law)

> to review a final judgment entered by the highest court of a State in which decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Id. at 544 n. 3 (quoting 28 U.S.C. §1257(2)). The Court concluded it had appellate jurisdiction because the appellants in that case "squarely challenged the constitutionality of the Unruh Act, *as applied*, and the [California] Court of Appeal sustained the validity of the statute *as applied*." *Id.* (emphasis added). With respect, however, to the appellants' facial challenge to the Unruh Act on grounds that it "is unconstitutionally vague and overbroad," *Id.* at 549, the Court declined review, "conclud[ing] that these contentions were not properly presented to the state courts." In so concluding, the Court explained:

(Continued from preceding page)

> *exercise of free speech would be infringed upon by enforcement of SCR 3.150. . . .* * * * In fact, the [KBA] has no compelling interest *in restricting Mr. [Roe's] speech. . . .* It would therefore be a violation of the First Amendment for the Court to follow the Board of [Governor's] Recommendation and *sanction Mr. [Roe] for his exercise of free speech.*

Roe Kentucky Supreme Court Brief at p. 11.

> When the Court considers all this and the facts that the literal terms of the Rule appear to give the accused the right to publish a bar complaint, that confidentiality rules are primarily for the benefit of the accused, and that an overly broad application of Kentucky SCR 3.150 would violate the fundamental guarantee of freedom of speech, *Mr. [Roe's] position appears well-founded.*

Roe Kentucky Supreme Court Brief at p. 15 (emphasis added).

> It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented to the state system." *Webb* v. *Webb*, 451 U.S. 493, 496-97 (1981). Appellants did not present the issues squarely to the state court until they filed their petition for rehearing with the [California] Court of Appeal. The court denied the petition without opinion. When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. * * * Appellants have made no such showing in this case.

Id. at 550 (internal citations and quotations omitted).

Here, too, Roe *for the first time* contends that SCR 3.150 is unconstitutional on its face. He further contends, *also for the first time,* that the rule is "void for vagueness and therefore violated the First Amendment." (Petition, p. 20). However, much like *Rotary Club,* Roe at no stage of the Kentucky proceedings raised either his facial challenge to SCR 3.150 or his "void for vagueness" claim. It thus cannot be said that these contentions were "adequately presented to the state system." *Id.* at 550.

There is no dispute that the Kentucky Supreme Court made no mention of Roe's First Amendment claim in its Confidential Order and, therefore, did not pass upon the federal questions Roe presses here. It must be "assumed that the omission was due to want of proper presentation" in the underlying Kentucky disciplinary proceedings, unless Roe "can affirmatively show the contrary." *Id.* In this case, as in *Rotary Club,* Roe has made no such showing. Indeed, the Petition focuses entirely on the purported merits of Roe's constitutional claims, and makes no effort to demonstrate proper presentation of these claims in the underlying proceedings.

Moreover, whether Roe's failure to raise his facial challenge and void for vagueness claim in the underlying Kentucky disciplinary proceedings is viewed as a jurisdictional barrier or simply a prudential consideration, *cf. Bankers Life And Casualty Company* v. *Crenshaw*, 486 U.S. 71, 79 (1988) (observing that it is an unsettled question whether the "'not pressed or passed upon below'" rule is a jurisdictional requirement or merely a prudential restriction, but not resolving the issue because "assuming the rule is merely prudential, . . . the more prudent course in this case is to decline review of appellant's claim"), it is clear that the more prudent course is to decline review of these contentions *since the Kentucky Supreme Court was not given an opportunity* to pass thereon in the first instance. The principle of comity alone provides sufficient justification for this Court to decline review of Roe's facial and void-for-vagueness challenges to SCR 3.150. In discussing "[t]he principle of comity that stands behind the 'properly-raised-federal-question' doctrine," *Webb*, 451 U.S. at 500, this Court explained as follows:

> It is appropriate to emphasize again...that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient vigor *to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.*
>
> In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. *Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on federal law.*

Webb, 451 U.S. at 499 (emphasis added).

In *Bankers Life, supra*, the Court made similar observations regarding the importance of allowing states the first opportunity to rule on federal constitutional challenges to their laws and the need for a properly-developed record:

> In determining whether to exercise jurisdiction over questions not properly raised below, the Court has focused on the policies that animate the "not pressed or passed upon below" rule. These policies are first, comity to the States, and second, a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal. *See Webb* v. *Webb, supra*, 451 U.S., at 500-501, 101 S.Ct., at 1893-1894. Because the chief issue appellant would have us resolve... is a question of some moment and difficulty, these policies apply with special force. * * * Our review of appellant's claim now would short-circuit a number of less intrusive, and possibly more appropriate, resolutions: the Mississippi State Legislature might choose to enact legislation...; failing that, the Mississippi state courts may choose to resolve the issue by relying on the State Constitution...; and failing that, the Mississippi Supreme Court will have its opportunity to decide the question of federal law in the first instance, while any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits. We think it unwise to foreclose these possibilities, and therefore decline to address appellant's challenges. . . .

Bankers Life And Casualty Co., 486 U.S. at 79-80. Here, the Kentucky Supreme Court has not been given the opportunity to rule on Roe's facial or void for vagueness challenges to SCR 3.150. The Kentucky Supreme Court also has had no opportunity to rule on Roe's claims relating to the First Amendment rights of bar disciplinary proceeding witnesses and complainants to the extent they are affected by SCR 3.150. Finally, the Supreme Court of Kentucky

had no opportunity to pass on Roe's contentions as to the Rule's purportedly indefinite restriction on disclosure of information relating to bar disciplinary proceedings.

Significantly, the Kentucky Supreme Court is the state body which actually promulgated the challenged rule and which has final authority to govern the conduct of Kentucky Bar members, including Mr. Roe, and to enforce the Court's rules applicable to bar members. The principle of comity dictates that it is the Kentucky Supreme Court—not this federal Court—which should be afforded the first opportunity to pass on whether *the Kentucky Supreme Court's own rule* is unconstitutional on its face or constitutionally void for vagueness, as Roe now—for the first time—contends.

As the foregoing precedent of this Court shows, the need for a properly-developed record is one of the chief practical justifications for this Court's insistence that issues brought to it for review must have been adequately raised in the prior state court proceedings. *See also Cardinale, supra,* 394 U.S. at 439 ("[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those in mind"). Roe's First Amendment challenge to SCR 3.150, as applied to him, was not raised as a claim in the proceedings which came before the Kentucky Supreme Court's review of the Board of Governors' decision, as explained above. Consequently, *no factual record* was developed regarding Roe's First Amendment challenge.[14]

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[14]The Petition itself makes this point readily apparent when one sees Roe *guessing* at the possible justifications and state interests behind Kentucky's Confidentiality Rule:

> [I]n disciplinary proceedings contesting similar confidentiality provisions, states have offered various rationales for confidentiality rules. * * * By enacting a similar provision, *it may be presumed* that Kentucky has determined that the same protection is necessary in Kentucky for similar reasons.

(Petition, p. 9; emphasis added).

Roe is left guessing at the rationale behind SCR 3.150 because of the sketchy record developed in the proceedings below, which itself is a result of Roe's failure to raise a First Amendment claim. Although Roe made passing reference to the First Amendment in his submissions to the Trial Commissioner and to the Board, it is apparent from those submissions that Roe's passing references were raised not as an independent claim, but merely as added justification for Roe's interpretation of SCR 3.150's attorney-respondent disclosure exception.[15]

Indeed, as related above, Roe essentially disavowed any intention to pursue a First Amendment challenge to SCR 3.150 and made it clear that his arguments relating to the First Amendment were offered—not as an independent defense to discipline for disclosure of the Bar Complaint—but as justification for the reasonableness of his actions and interpretation of the attorney-respondent disclosure exception. Given the untimely and half-hearted manner in

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[15]In *Rotary Club, supra,* this Court made a similar observation in rejecting an argument the appellants advanced as to whether they had preserved a particular issue for Supreme Court review:

> Appellants point to a passage in the brief they filed in the California Court of Appeal that quotes this Court's opinion in *NAACP* v. *Button,* 371 U.S. 415, 435 (1963): "'It is enough [for unconstitutionality] that a vague and broad statute lends itself to selective enforcement against unpopular causes.'" • • • The quotation occurs in the course of an argument that the Unruh Act should be applied only to memberships in entities that are a vehicle for the public sale of goods, services, or commercial advantages. *This casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction under 28 U.S.C. §1257(2).*

Rotary Club, 481 U.S. at 550 n. 9 (brackets in original; emphasis added).

which Roe "presented" his constitutional arguments in the proceedings below, and the resulting lack of a factual record regarding those issues, this case simply is not a proper candidate for review under this Court's certiorari jurisdiction.

III. Roe Lacks Standing To Obtain A Decision On The Merits Of His Arguments Relating To The Rights Of Complainants And Witnesses To Bar Disciplinary Proceedings

In broadly attacking SCR 3.150, Roe challenges the Rule's disclosure restrictions not so much as applied to attorneys like himself who were the target of the disciplinary proceedings, but as applied to complainants, witnesses and other third parties whose First Amendment rights were in no way implicated or asserted in the proceedings below.[16] In addition to Roe's failure to assert these rights in the underlying state proceedings, it is apparent that Roe lacks standing to seek redress for the hypothetical violation of the rights of others from operation of SCR 3.150.

In *Warth* v. *Seldin*, 442 U.S. 490 (1975), a seminal case on standing, the Court summarized the law on this issue as follows:

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[16] Throughout the Petition, which inappropriately focuses on the purported merits of Roe's contentions, Roe makes arguments relating to the alleged rights of witnesses, complainants and other third parties. (*See* Petition, p. 12: " . . . the Rule violates the First Amendment rights of all complainants . . . and witnesses who participate in bar disciplinary proceedings"; p. 14: "[i]f an individual decides to file a complaint, he is indefinitely barred from discussing the merits of the complaint. The state does not have a compelling interest in prohibiting a participant from disclosing information of which he has first-hand knowledge. . . . "; and p. 15: "[A] state does not have a compelling interest in prohibiting witnesses from disclosing the substance of their testimony before a disciplinary board").

> *In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.* This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.
>
> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. * * * The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action. . . .' * * *
>
> Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts decisional and remedial powers. * * * [E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that *the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.*

Warth, 422 U.S. at 498-99 (emphasis added; internal citations omitted).

Insofar as Roe asks this Court to decide issues relating to the purported First Amendment rights of complainants and witnesses involved in Kentucky bar disciplinary proceedings and to hold that the disclosure restrictions of SCR

3.150 violate their rights, he is resting his position on the legal rights and interests of third parties. As this Court held in *Warth*, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of *particular issues*." *Id.* at 498. Roe is not entitled to have this Court decide the merits of issues relating to the rights of bar disciplinary proceeding complainants and witnesses since he was a defendant—not a witness or complainant—and since those issues were in no way implicated or raised in those proceedings. Because Roe lacks standing to have the Court decide the merits of these issues, none of which were raised below, the Petition should be denied.

IV. The Only Issue Preserved For Review By This Court Is Insubstantial And Unworthy Of Review Under This Court's Certiorari Jurisdiction

When viewed from the proper jurisprudential perspective, the question before this Court becomes insubstantial. In terms of what has been properly preserved for Supreme Court review, the question at bar becomes little more than whether the Kentucky Supreme Court misconstrued its own rule. Roe raises the issue of whether he, as the defendant in a bar disciplinary proceeding, had the right to make a public disclosure of disciplinary proceedings initiated against him. In making this argument, however, Roe overlooks that the challenged rule contains broad disclosure exceptions, as discussed above, which clearly are intended to promote the rights and interests Roe himself seeks to protect.

As Roe concedes, SCR 3.150 contains certain exceptions which, in specified circumstances, permit disclosure by the attorney against whom the disciplinary charge or complaint is pending. One exception provides that "[a]n attorney against whom any complaint or charge is pending may elect to discuss his case with others to the extent he

deems it appropriate consistent with the defense of his case and the practice of his profession." SCR 3.150(1)(c).[17] The other exception states that "[u]pon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact." SCR 3.150(1)(d). These exceptions are significant because the instant case, when distilled to its properly-preserved essence, concerns (at most) whether Roe—as the attorney being charged with a disciplinary violation—had the right to make a public disclosure of the Bar Complaint.

In this regard, it is worthwhile to consider some of the considerations governing review on certiorari. According to this Court's Rule 10: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." United States SCR 10. Here, the Petition does not identify *any* compelling reasons for Supreme Court review of the judgment below. A ruling by this Court in Roe's favor essentially would amount to little more than federal interference with the Kentucky Supreme Court's interpretation of its own attorney disciplinary rule, i.e., SCR 3.150(1)(c). Notably, the Kentucky Supreme Court was itself divided on whether Roe violated SCR 3.150(1)(c), with four justices voting to adopt the Board of Governors' Recommendation and three voting against it.

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[17]As the record below demonstrates, the scope and operation of this exception—as opposed to any First Amendment issue—clearly was the focus of Roe, the KBA and all others involved in the subject disciplinary proceedings. Even in his Brief to the Kentucky Supreme Court, Roe continued focusing his position on the argument that First Amendment jurisprudence supported his interpretation of Kentucky SCR 3.150(1)(c), and not so much on his present contention that the First Amendment provided an independent basis for defending against the proposed disciplinary action.

Stated somewhat differently, this case can be viewed as one in which "the asserted error consists of...the misapplication of a properly stated rule of law." United States SCR 10. Under this Court's Rule 10, a "petition for a writ of certiorari is rarely granted" in such a case. Roe's Petition does little more than ask this Court to hold that the majority simply misapplied Kentucky state law. This Court, for sound reasons, typically does not grant certiorari in such a case.

CONCLUSION

For the reasons stated in this brief, the Kentucky Bar Association respectfully requests that Roe's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Robert Leathers, counsel of record for Respondent, hereby certify that forty (40) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543; that three copies were mailed to Hon. Walker P. Mayo, III, Bowles Rice McDavid Graff Love & Getty, Suite 1200, 333 West Vine Street, Lexington, Kentucky 40507; on this the 30th day of January, 1997, by my personally depositing same in a United States mailbox, first class postage prepaid. I further certify that all parties required to be served have been served.

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